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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals has rendered a decision which is in direct conflict with decisions of other Courts of Appeals as to the question presented. That question is whether the Court of Appeals has issued a decision which is contrary to the fundamental principles of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*, by holding that the Federal Energy Regulatory Commission ("FERC" or "Commission") may *retroactively* modify a tariff provision which the natural gas pipeline company, Colorado Interstate Gas Company ("CIG"), did not propose to change and which the Commission previously approved.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Colorado Interstate Gas Company.*

The parties below were: ANR Pipeline Company; Champlin Petroleum Company; Citizens Utilities Company; City of Colorado Springs; City and County of Denver; City of Fort Morgan; Colorado Interstate Gas Company; Colorado Public Service Commission; Columbia Gas Transmission Corporation; Federal Energy Regulatory Commission; Greely Gas Company; Kansas-Nebreska Natural Gas Company; MAPCO, Inc.; MIGC, Inc.; Mountain Fuel Supply Company; Natural Gas Pipeline Company of America; Northwest Central Pipeline Corporation; Panhandle Eastern Pipe Line Company; Peoples Energy Corporation; Peoples Natural Gas Company, Division of InterNorth, Incorporated; Public Service Company of Colorado; State of Colorado; State of Texas; State of Wyoming; The People's Gas Light and Coke Company, and North Shore Gas Company; United Gas Pipe Line Company; and Western Gas Supply Company and Cheyenne Light; Fuel & Power Company.

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* The following is a list of any parent, and affiliates of Colorado Interstate Gas Company and subsidiaries which are not wholly owned:

Coastal Corporation
ANR Pipeline Company
Numericom, Inc.

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No. ————

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Colorado Interstate Gas Company ("CIG") petitions for a writ of certiorari to review the May 19, 1986 decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision for the United States Court of Appeals for the Tenth Circuit (App A.) is reported at 791 F.2d 803 (10th Cir. 1986). The order denying rehearing and rehearing *en banc* (App. B) is not reported.

The orders of the Federal Energy Regulatory Commission (App. C) are reported as follows:

Colorado Interstate Gas Company, "Order Affirming Initial Decision in Part and Reversing Initial Decision in

Part," 27 F.E.R.C. (CCH) ¶ 61,315 (May 25, 1984), and *Colorado Interstate Gas Company*, "Order Denying Rehearing," 28 F.E.R.C. (CCH) ¶ 61,083 (July 23, 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1986. The order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on July 2, 1986.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute upon which the Court of Appeals' decision is based is the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*, the relevant excerpts of which appear in Appendix D.

STATEMENT OF FACTS

The Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*, gives the Federal Energy Regulatory Commission ("Commission" or "FERC") the power, *inter alia*, to regulate the rates of interstate natural gas pipeline companies. Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and d, prescribe the manner in which regulation is to be accomplished. Pursuant to Section 4 of the NGA, 15 U.S.C. § 717c, the Commission is authorized to suspend, for up to five months, any changes which a natural gas company proposes to make in its existing tariff, but if the suspension ends before a decision is rendered, the Commission may require the company to refund any amounts which are subsequently determined to be unjust and unreasonable. This Court has made it clear that it is a "pipeline's tariff *amendments*" which are subject to the Commission's suspension and refund authority under Section 4. *See, FPC* v. *Louisiana Power & Light Company*, 406 U.S. 621, 645 (1972) (emphasis added). In

contrast, Section 5 of the NGA, 15 U.S.C. § 717d, authorizes the Commission to review existing tariff provisions and to determine the appropriate tariff provisions "to be *thereafter* observed" by the company. 15 U.S.C. § 717d(a) (emphasis added). This Court has also recognized that any change which is made pursuant to Section 5 must be implemented on a prospective basis, from the date the Commission's order becomes effective. *Atlantic Refining Co.* v. *Public Service Commission of N.Y.*, 360 U.S. 378, 389 (1959); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

With the foregoing as the statutory background, in March, 1982, CIG filed a general rate increase filing with the Commission pursuant to Section 4 of the NGA. CIG proposed increased rate levels, but did not propose to change most of the previously Commission-approved provisions of its tariff. One such tariff previously approved provision which CIG did not propose to change or modify was a "minimum bill provision" in a tariff (contract) with Natural Gas Pipeline Company of America ("Natural"). Such minimum bill provision required Natural to pay for 90% of the volume of gas which it is contractually entitled to purchase. This specific minimum bill provision had been in effect since the fall of 1980 (and variants thereof, for twenty-five years prior thereto).[1] Pursuant to its Section 4 authority, the Commission suspended CIG's rate increase filing and did not permit such filing to become effective until September 29, 1982. However, the unchanged portions of CIG's tariff continued in effect during the five month suspension period, including the subject minimum bill provision. When it later issued its final order on May 25,

[1] As recently as June 24, 1982, almost three months *after* the rate filing at issue in this proceeding was filed, the Commission reviewed a certificate filing by CIG which included the very minimum bill provision at issue herein and issued the requested certificate without modifying this provision. *Colorado Interstate Gas Co.*, 19 F.E.R.C. (CCH) ¶ 61,283 (1982).

1984, the Commission ordered CIG to eliminate the minimum bill provision, *retroactive* to the end of the suspension period.

The Court of Appeals below recognized that CIG's rate increase filing "neither altered nor mentioned the minimum bill provision in the service agreement between Natural and CIG." *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d 803, 805 (10th Cir. 1986); App. A at 2a-3a. Nevertheless, the Court affirmed the Commission order which *retroactively* changed this minimum bill provision.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The issue posed here is a matter of interpretation of a federal statute, which is of fundamental importance to the entire natural gas industry and all interstate gas consumers, as to which interpretation there is a direct conflict between United States Courts of Appeals.

Although the Court of Appeals for the Tenth Circuit, below, recognized that CIG proposed *no change* in its existing minimum bill provision with Natural, that Court nevertheless held that the Natural Gas Act allows the Commission to change such a provision *retroactive* to the date CIG's rate change filing became effective, subject to refund. That decision is in direct conflict with a number of decisions of the Courts of Appeals for the District of Columbia Circuit and Fifth Circuit on the identical issue. It is clearly untenable for interstate pipeline companies and their consumers to be treated differently in different Courts of Appeals on the *same* issue. This issue arises in virtually every pipeline rate case, and is obviously of great importance to the natural gas industry and gas consumers, and to the administration of the Natural Gas Act. Finally, the Court of Appeals' decision below is based upon an erroneous interpretation not only of the NGA, but also of decisions of other Courts of Appeals upon which the decision below relies.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals Has Rendered A Decision Which Is In Direct Conflict With The Decisions Of Other Courts Of Appeals.

The fundamental issue in this case is whether the Commission has the authority to *retroactively* modify an existing, Commission-approved tariff provision which CIG did not propose to modify and which had been in place for many years. This issue has been addressed in numerous Courts of Appeals' decisions and, until the issuance of the decision below by the Court of Appeals for the Tenth Circuit, those decisions have each reached the same conclusion—the Commission has no authority to modify an *unchanged* tariff provision *retroactively*.[2] Such change must be made pursuant to the requirements of Section 5 of the NGA, which limits the Commission's power to *prospective* relief. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1972). The Commission, however, has continued to seek to circumvent those principles, but until the case below, has been uniformly reversed by the Courts of Appeals.

The most recent in this series of Courts of Appeals' decisions is *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182 (D.C. Cir. 1986). In *Sea Robin*, the Commission attempted to *retroactively* change a pipeline company's existing methodology for calculating a transportation rate, even though the company had proposed no change in such methodology. Since the retroactive change in methodology resulted in lower rates for certain customers, the Commission ordered Sea Robin Pipeline Company ("Sea Robin") to make refunds to those customers. In

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[2] That conclusion is reinforced by the fact that the Commission's refund (retroactive application) authority under Section 4 applies only to rates or provisions which are suspended by the Commission, *Moss* v. *FPC*, 502 F.2d 461 (D.C. Cir. 1974), *rev'd on other grounds*, 424 U.S. 494 (1976). In this proceeding, the minimum bill provision was not suspended.

attempting to support this retroactive modification, the Commission argued that, since the company had filed a general rate increase filing, the Commission could review the unchanged tariff provision pursuant to its Section 4 authority, alleging as the basis that such provision was an "integral part" of the rate increase filing. The Court of Appeals rejected the Commission's argument, holding (795 F.2d at 187):

> The Commission's action . . . does not fall into the narrow Section 4 range of acceptance or disapproval of a pipeline's proposed changes; rather, the order imposes on Sea Robin a completely new rate prescription, neither proposed nor previously used by the pipeline. Such action is authorized only under Section 5. *See City of Willcox* v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S, 1012, 98 S.Ct. 724, 54 L.Ed.2d 755 (1978).

The Court further emphasized that there are clear differences between the Commission's authority and review process under Sections 4 and 5 of the NGA stating (795 F.2d at 183):

> The Commission is not free to blend, or pick and choose at will between its Section 4 and 5 authority; FERC must use the appropriate authorization in the appropriate way in order to remain with the bounds Congress has set for the agency.

In specific reference to the retroactive aspect of the Commission's order, the Court concluded that since the Commission could only act pursuant to its authority under Section 5, the "FERC may order *only prospective relief* if it finds a *previously accepted provision* unlawful". 795 F.2d at 187 (emphasis added).

The decision in *Sea Robin* is consistent with the holdings of several earlier decisions issued by the Court of Appeals for the District of Columbia Circuit, which address the same issue as that involved in *Sea Robin*. The first is *Public Commission of New York* v. *FERC*, 642

F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981) (hereinafter referred to as "Transco"). In *Transco*, the Court of Appeals also rejected a Commission decision to apply Section 4 standards to an *unchanged tariff provision*. As in *Sea Robin*, the Commission argued that its review of the unchanged tariff provision could be undertaken pursuant to Section 4 of the NGA, since the pipeline had filed a general rate increase. In rejecting this argument, the Court of Appeals stated (642 F.2d at 1345):

> Had Transco proposed any changes in [its existing zone rate differentials in its tariff], the Commission, acting under Section 4(e), could have approved the changes in whole or in part. *Section 4(c), however, cannot be used by the Commission to institute any change in a ratemaking component*, such as cost allocation, *that does not represent at least partial approval of the change for which the enterprise had petitioned in its filing.* If the Commission seeks to make such changes, it has no alternative save compliance with the strictures of Section 5(a). (Emphasis added).

In *ANR Pipeline Company* v. *FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985), the Court of Appeals adhered to the *Transco* decision and again emphasized that Section 4 and Section 5 "are not alternatives within the FERC's discretion to select; each is a limited grant of authority to the Commission." The Commission must act pursuant to the requirements of Section 5 if it seeks to impose "a change not proposed by the natural gas company—including *an alteration in an unchanged part of a proposed higher rate . . .*" 771 F.2d at 514.

The Court of Appeals for the Fifth Circuit has made the same interpretation of the Natural Gas Act. In *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509, 524 (5th Cir. 1981), the Court held that the pipeline company "was not required to re-prove the established cost methodology," which the company had not proposed

to change, but was only required to prove that the proposed rate levels, based upon that methodology, which levels *were* changed, were just and reasonable.

In contrast to the District of Columbia and Fifth Circuits, the Court of Appeals for the Tenth Circuit has here issued a decision which is in direct conflict with the cases described above. The proeceding before the Tenth Circuit involved a case which is virtually identical to those involved in the decisions cited above. Specifically, CIG had filed a general rate increase at the Commission pursuant to Section 4. In that filing, CIG proposed no change in the minimum bill provision in its tariff. There was no mention of this provision in the Commission's order suspending CIG's rate increase filing. Subsequently, after a hearing, the Commission ordered CIG to *retroactively* change this provision. On appeal, the Tenth Circuit affirmed the Commission's order. In so doing, the Court did not even mention the decisions in *Transco*, *ANR* and *New Orleans Public Service*.[3] The Court made no effort to reconcile its decision with those earlier cases. In CIG's request for rehearing to the Court, CIG pointed out the conflict between its decision and those of other Courts of Appeal; however, the Court still chose to ignore the earlier decisions.

The decisions of the District of Columbia and Fifth Circuits have consistently applied the standards set forth in the *Transco* decision, which holds that the Commission must act pursuant to the strictures of Section 5 if it desires to change or modify an existing tariff provision which the applicant has not proposed to change. This holding is applicable even if the applicant has made a Section 4 general rate increase filing which includes the unchanged tariff provision. "This limitation allows the pipeline to rely on a filed rate or tariff provision, once the Commission has permitted it to become effective, until

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[3] The *Sea Robin* decision was issued subsequent to the issuance of the Tenth Circuit's decision in this case.

such time as the rate is proved to be unlawful." *Sea Robin*, 795 F.2d 182, 184 (D.C. Cir. 1986). Without such a limitation, pipelines would never have any rate certainty, which is untenable for the gas industry.

As the foregoing demonstrates, a clear conflict between Courts of Appeals has been established. Under these circumstances, granting this petition for certiorari is appropriate. *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557, 559 (1968); *Northeastern Pennsylvania National Bank & Trust Co.* v. *United States*, 387 U.S. 213, 217 (1967). Rule 17, Supreme Court of the United States.

II. A Uniform And Appropriate Interpretation Of The Question Presented Here Is Of Paramount Importance To The Natural Gas Industry.

A large number of companies are regulated by the Commission pursuant to its NGA Sections 4 and 5 authority, and the rates of such companies relate to the bulk of the natural gas sold in the United States. Each time one of these companies makes a general rate increase filing, the issue involved here is present. Pursuant to the Commission's Regulations, each interstate gas pipeline company must make at least one rate filing every three years. Generally, however, interstate pipelines file more often than that. Thus, it is clear that the issue involved here is constantly before the Commission. The Commission persists in its misinterpretation of the Natural Gas Act in multiple cases at the Commission level and the issue has required appeal on numerous occasions. Now that the Commission has finally secured a decision—albeit erroneous—which has adopted its position, the issue is certain to recur repeatedly, until finally resolved by this Court. Given the large number of cases involving this issue, it is obvious that a uniform resolution of the issue is of great importance to the administration of law, as well as to the natural gas industry.

III. The Court Of Appeals Supported Its Decision On An Erroneous Interpretation Of Previous Courts Of Appeals' Decisions.

The error of the decision below is shown clearly by the fact that to try to support its position, the Tenth Circuit relied on a District of Columbia Court of Appeals' opinion which the District of Columbia Circuit itself has held does not support the proposition which the Tenth Circuit thinks that opinion supports. That is, the Tenth Circuit, below, relied heavily on *Cities of Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982), and cites (791 F.2d at 807, App. A at 6a) that case after stating:

> The Commission may review a gas company's rate structure to insure that all parts of the structure—both old and new—operate together to produce just and reasonable rates.

The Commission also relied on *Cities of Batavia* and made the same argument to support its position that it could review an unchanged provision in Sea Robin's rate increase filing pursuant to its Section 4 authority. However, in *Sea Robin*, the same Court which issued the *Cities of Batavia* decision rejected the Commission's argument, stating (795 F.2d at 187):

> *Cities of Batavia* merely observes that in a section 4 proceeding, the Commission may evaluate the new proposed rates in light of all the old, existing provisions. If the Commission disapproves of the interaction between old and new rate provisions, it has the power under section 4 to reject the new rate, partially or completely, and reinstate the old one. *But neither section 4 nor the* Cities of Batavia *opinion gives the Commission the authority to reject, post hoc, a previously accepted provision or to specify what should replace it.* (emphasis added).

From the foregoing language in *Sea Robin*, it is clear that the Tenth Circuit's reliance on *Cities of Batavia* to

justify the *retroactive* alteration of an *unchanged* tariff provision is inappropriate and in error.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] The Tenth Circuit also cited *Laclede Gas Co.* v. *FERC*, 670 F.2d 38 (5th Cir. 1982). *Laclede* involved the identical issue as that in *Cities of Batavia*; therefore, the reasoning in *Sea Robin* is equally applicable to the Court's reliance on *Laclede*. The Commission, in *Cities of Batavia* and *Laclede*, did not, as it did here, attempt to modify an unchanged *tariff provision*. Rather, these cases involved a modification of the rates themselves. Similarly, the other cases relied on by the Tenth Circuit, *Florida Gas Transmission Co.* v. *FERC*, 741 F.2d 1307 (11th Cir. 1984) and *North Penn Gas Co.* v. *FERC*, 707 F.2d 763 (3rd Cir. 1983), like *Laclede* and *Cities of Batavia*, did not address the issue of whether an unchanged tariff provision can be changed retroactively, but instead also dealt with rate levels.